91-1631

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GURNEY ALFRED,

Petitioner

v.

UNITED PARCEL SERVICE, INC., et al.,

Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAN M. SCHEUERMAN
Counsel for Petitioner

405 St. Ferdinand St.
Baton Rouge, Louisiana 70802
Telephone: (504) 387-1221
LA Bar No. 11767

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a union representative's failure to provide a full investigation of a grievance constitutes perfunctory conduct and breaches the union's duty of fair representation?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following parties have an interest in the outcome of this proceeding.

Gurney Alfred – Petitioner

United Parcel Service, Inc. – Respondent

General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local No. 270 – Respondent

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OPINIONS AND REPORTS

The opinion of the Court of Appeals for the Fifth Circuit has not been reported and is reprinted in the appendix hereto. The opinion of the U.S. District Court has not been reported and is also reprinted in the Appendix hereto.

JURISDICTIONAL STATEMENT

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on January 10, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. section 185

28 U.S.C. section 1245 (1)

STATEMENT OF THE CASE

Course of Proceedings And Disposition Below

Gurney Alfred filed this action against the United Parcel Service, Inc., and General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270 on November 17, 1989. Pursuant to § 301 of the Labor Management Relations Act of 1947 (29 U.S.C. Section 185), Gurney Alfred sought to recover damages for his unlawful discharge by the defendant, United Parcel Service, Inc., and for breach of fair representation by defendant General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270.

The defendants filed separate motions for summary judgment which the District Court granted on January 17, 1991.

A petition for rehearing was filed with the District Court on February 1, 1991 and was subsequently denied on May 20, 1991.

Upon the District Court's denial of the petition for rehearing, a notice of appeal was timely filed on June 18, 1991.

On January 6, 1992, the U.S. Court of Appeals for the Fifth Circuit heard oral arguments and subsequently affirmed the judgment of the District Court on January 10, 1992, without opinion on the issues raised in the appeal.

ARGUMENT

Summary judgment is proper when the party defending against the motion can not establish the existence of the elements which are essential to his case. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). However, if the party defending against the motion can show that a genuine issue of material fact remains on the essential elements of his case, then the motion should be denied as a matter of law. See *McCrae v. Hankins*, 720 F.2d 863 (5th Cir. 1983).

In the case at bar, petitioner alleged that he was unlawfully discharged by respondent, United Parcel Service (U.P.S.), Inc., for "dishonesty" for allegedly making unauthorized long distance calls at the company's expense. Furthermore, the petitioner alleged that the respondent, General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270 (union)

failed in its duty to fairly represent him in the grievance process. In order to prevail against either respondent, the petitioner carries the burden of demonstrating a breach of duty by the union regardless of his claim against the employer; establishing a breach of duty by the union is the threshold requirement in such a hybrid suit. *Hines v. Anchor Motor Freight, Inc., et al.*, 424 U.S. 554, 96 S.Ct. 1048 (1976). In order to show that the union violated its duty of fair representation, the petitioner must establish that the union's conduct toward a member was arbitrary, discriminatory, or in bad faith, or that the union acted in a perfunctory fashion. *Hines*, supra, *Del Costello v. International Brotherhood of Teamsters, et al.*, 462 U.S. 151, 1035 S.Ct. 2281 (1983), *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967). In policing union conduct that is arbitrary and perfunctory, courts have been willing to look beyond the question of whether a union in fact pursues an employee's grievance (contractual or statutory) and determines whether the union has made a full investigation, has given the grievant notice and an opportunity to participate, has mustered colorable arguments, and has refuted insubstantial arguments by the employer. R. Gorman, *Labor Law* 718 (1976). Although Mr. Gorman's definition of perfunctory is plausible, this court has never given its definition on what conduct on the part of a union would be considered perfunctory.

Using Mr. Gorman's definition, petitioner has clearly raised a genuine issue of material fact with respect to the investigation undertaken by the union representative. In the case at bar, petitioner, Gurney Alfred, was accused of making unauthorized long distance calls at the expense of U.P.S. The Union representative failed in his investigation

inasmuch as he did not investigate this allegation at all. The only step taken by the union representative was to tell the petitioner to call the number and get a statement that he had not called the number. Such inaction on the part of the union representative implies that he performed his duty in a perfunctory fashion.

The union representative, Nolan LeBlanc, presented an affidavit which stated that he had thirty-seven years of experience representing union members and that he investigated and processed petitioner's grievance. Surely, the act of telling the grievant to call the suspected number and get a statement from them does not equate to a full investigation. Mr. LeBlanc could have checked the petitioner's time sheets against the phone bill, spoke with other employees working petitioner's shift, or pursued a number of other avenues given the fact that Mr. LeBlanc has thirty-seven years experience in such matters.

This Court has stated that the breach of the duty of fair representation must affect the result or outcome of the proceeding. *Humphrey v. Moore*, 375 U.S. 335, 84 S.Ct. 363 (1964). Petitioner submits that if the union representative had performed a cursory investigation, then the outcome of the proceeding would have been different. However, by the failure to afford the petitioner with a full investigation, which was his right to have, the union breached its duty of fair representation.

CONCLUSION

The Fifth Circuit Court of Appeal affirmed the District Court's opinion and judgment without comment or reasons. The opinion of the District Court was in error because the court failed to recognize that the union acted in a perfunctory fashion breaching its duty to provide a full investigation for petitioner. Moreover, because the lower courts have not expressed a consensus concerning the meaning of perfunctory, this Court has a duty to guide the lower courts by defining what conduct constitutes a perfunctory performance in the context of a duty to provide a full investigation.

Respectfully submitted,

DAN M. SCHEUERMAN
Counsel for Petitioner
405 St. Ferdinand St.
Baton Rouge, Louisiana 70802
Telephone: (504) 387-1221
LA Bar No. 11767

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3527

GUERNEY ALFRED,

Plaintiff-Appellant,

versus

UNITED PARCEL SERVICE, INC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana
(CA-89-876-A-M1)
(January 10, 1992)

Before POLITZ, SMITH, Circuit Judges and FITZWATER*, District Judge.

PER CURIAM:**

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* District Judge of the Northern District of Texas sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This matter is before the court on the appeal of Guerney Alfred of an adverse summary judgment in favor of United Parcel Service and General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 27. Having considered the briefs and oral arguments of counsel and the pertinent parts of the record, and finding no reversible error, the judgment of the district court is AFFIRMED.

APPENDIX B

MIDDLE DISTRICT OF LOUISIANA

GURNEY ALFRED

VERSUS CIVIL ACTION

UNITED PARCEL SERVICE, INC., ET AL NO. 89-876-A

RULING ON MOTION FOR REHEARING

This matter is before the court on a motion by plaintiff for "rehearing." Defendants have filed an opposition. There is no need for oral argument.

Plaintiff moves for a new trial on the basis of "newly discovered evidence." Plaintiff's motion is clearly without merit, as shown by the opposition filed by defendants.

Accordingly, the motion by plaintiff for "rehearing" is hereby DENIED.

Baton Rouge, Louisiana, May 20, 1991.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GURNEY ALFRED

VERSUS CIVIL ACTION

UNITED PARCEL SERVICE, INC., ET AL NO. 89-876-A

RULING ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the court on motions for summary judgment brought by each of the two defendants. Plaintiff has filed an opposition. There is no need for oral argument. Jurisdiction is allegedly based upon §301 of the Labor Management Relations Act of 1947, 29 USC §185.

Plaintiff, Gurney Alfred, alleges that he was unlawfully discharged by defendant, United Parcel Services, Inc., on May 18, 1989, for "dishonesty." More specifically, UPS allegedly fired plaintiff for making unauthorized long distance telephone calls at the company's expense. Plaintiff further claims that defendant, General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270, failed to fairly represent him in pursuing his grievance under the collective bargaining agreement.

In support of their motions for summary judgment, the company and the local union contend that the undisputed facts show that plaintiff was fairly represented in the grievance proceedings. Defendants additionally argue

that plaintiff's state law claims are preempted by the Labor Management Relations Act.

It is well established that the outcome or finality of a grievance proceeding is subject to very limited judicial review. DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). In order to prevail against either the employer or the union, plaintiff must not only show that his discharge was contrary to the collective bargaining agreement but that the union breached its duty of fair representation as well. Id.

A breach of the duty of fair representation occurs only when the union's conduct is arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Moreover, the breach must affect the result or outcome of the grievance proceedings. See Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

In his opposition, plaintiff refers to two "breaches" by the Union. The first breach purportedly occurred on May 15, 1989, when the station manager initially questioned plaintiff about the unauthorized telephone calls without a "proper representative" being present. There is no dispute that Freeman Jennings, the designated mechanic steward, was summoned because no other stewart was available. Plaintiff has failed to demonstrate how this constitutes a breach or how it had any effect upon the ultimate decision, especially since plaintiff admits he was fairly represented at the meeting before the Grievance Committee on July 19, 1989.

The second breach allegedly occurred at the June 15th grievance meeting when Freeman Jennings indicated

(by nodding his head) that plaintiff had previously admitted to making some long distance phone calls. Plaintiff argues this was a "definite breach" because plaintiff never admitted making the phone calls in question. However, even plaintiff concedes that Jennings might have been confused since plaintiff did admit to making some phone calls, albeit to another telephone number. The court fails to comprehend how this amounts to conduct which is arbitrary, discriminatory or in bad faith.

Plaintiff additionally contends that his representative should have pursued a settlement offer that allegedly was made at the June 15th meeting. Plaintiff argues that the union failed to "pursue every avenue" by not acting on the settlement proposal. This argument patently lacks merit because based upon plaintiff's own testimony, the offer was effectively withdrawn only seconds after it was made.

Finally, plaintiff complains about the union's failure to interview "the individual Mr. Alfred allegedly placed calls to." Plaintiff contends that "this individual" has since testified by way of deposition that "she not only never received any calls from Mr. Alfred but that she has neither seen him before nor ever heard of him." The court assumes that plaintiff is referring to the deposition of Mrs. Willie Mae Turner, defendants' exhibit "G". That testimony in no way exonerates plaintiff since it is clear that the individual the company believed plaintiff had been calling was Mrs. Turner's daughter. If the daughter's deposition has been taken, plaintiff has failed to submit it. Moreover, as defendants correctly point out,

plaintiff himself secured a written statement from Mrs. Turner which was presented at the initial hearing.

The court further agrees with defendants that plaintiff's state law claims are preempted. See Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985). Moreover, the court would decline to maintain jurisdiction over such claims as the federal claims have been resolved.

Accordingly, the motions by defendants for summary judgment are hereby GRANTED and judgment will be entered in favor of each defendant.

Baton Rouge, Louisiana, January 14, 1991.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

(2)

No. 91-1637

In The

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October Term, 1991

GURNEY ALFRED,

Petitioner,

v.

UNITED PARCEL SERVICE, INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. MCCALLA
(Counsel of Record)
KEITH M. PYBURN, JR.
JULIA S. MANDALA
MCCALLA, THOMPSON, PYBURN & RIDLEY
Poydras Center – Suite 2800
650 Poydras Street
New Orleans, Louisiana 70130
Telephone (504) 524-2499

Attorneys for Respondent United Parcel Service, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUE PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals correctly affirmed the district court's holding that the General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270 did not, as a matter of law and based on the undisputed facts, violate its duty of fair representation.

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. Gurney Alfred, petitioner
2. United Parcel Service, Inc.,[1] respondent
3. General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270, respondent

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[1] Pursuant to Sup.Ct.R. 29.1, United Parcel Service, Inc. informs the Court that its parent corporation is United Parcel Service of America, Inc., and that all subsidiaries are wholly-owned subsidiaries of which Sup.Ct.R. 29.1 does not require disclosure.

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STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 151:

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and

bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 185:

§ 185. Suits by and against labor organizations

(a) Venue, amount and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States with jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall

be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below

Plaintiff[2] filed his lawsuit on November 17, 1989, claiming that United Parcel Service ("UPS" or "Company") breached the collective bargaining agreement with

[2] For purposes of this Brief, Petitioner Alfred will be referred to as "Plaintiff" and Respondents UPS and Local 270 will be referred to as "Defendants."

the General Truck Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 270 ("Local 270" or "Union") when it terminated his employment, and that the Union breached its duty of fair representation in the contractual grievance proceedings protesting his discharge. This type of claim is commonly referred to as a hybrid § 301/DFR suit, because in order to sue the Company for breach of the collective bargaining agreement under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, Plaintiff must show that the Union breached its duty of fair representation, implied under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, during the contractual grievance proceedings, and that the Union's breach affected the result or outcome of the grievance proceedings.[3] *See DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 164-65, 103 S. Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983) (explaining § 301/DFR suits).

On August 22, 1990, the Company and Union filed motions for summary judgment because the undisputed facts showed the Union had not breached its duty of fair representation and because Plaintiff had failed to show how the alleged deficiencies in the Union's representation affected the outcome of the grievance proceedings. Plaintiff filed an Opposition on November 26, 1990. The district court granted Defendants' motions for summary judgment on January 14, 1991, and entered a judgment on

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[3] Plaintiff originally also brought state law claims, but the district court held that those claims were preempted by § 301 of the LMRA (Appendix A to Plaintiff's Petition for Writ of Certiorari at App. 7). Plaintiff did not dispute this holding on appeal.

January 17. (Appendix A to Plaintiff's Petition for Writ of Certiorari ("Plaintiff's Petition")). Plaintiff filed a "Petition for Rehearing" on February 1, 1991. The district court denied the Petition for Rehearing on May 20, 1991, on the basis that no newly discovered evidence had been produced. (Appendix B to Plaintiff's Petition). The Fifth Circuit Court of Appeals affirmed the district court's judgment in a per curiam opinion. (Appendix C to Plaintiff's Petition).

B. Statement of Facts

Plaintiff is a former employee of UPS. Plaintiff was terminated on May 18, 1989 for making unauthorized long distance telephone calls on company time at company expense.

At all relevant times, Plaintiff was a member of Defendant Union and his terms and conditions of employment were governed by the collective bargaining agreement ("CBA") between UPS and the Union. The CBA prohibits UPS from terminating an employee without just cause. The agreement also provides a grievance procedure, the results of which are final and binding on the parties. On May 25, 1989, Plaintiff, through his Union, filed a grievance protesting his discharge and requesting back pay and reinstatement. Plaintiff's grievance was processed through the highest level of the grievance procedure authorized under the CBA – the "Deadlock Committee." The Deadlock Committee denied Plaintiff's grievance and sustained his discharge.

The subject of Plaintiff's grievance related to his discharge for making personal long distance telephone calls

at company expense and on company time. Plaintiff filed this suit on November 17, 1989, asserting that the Union failed to properly represent him during the grievance proceeding and that the Company breached the collective bargaining agreement by terminating him. Plaintiff now claims the only investigation performed by the Union officer who represented him, Nolan LeBlanc, was to obtain the telephone number that the Company claimed Plaintiff called. LeBlanc advised Plaintiff to call the number and ask for a statement that Plaintiff had not called there. In an uncontradicted affidavit, LeBlanc explained that he believed the call should come from Plaintiff because: 1) people are often reluctant to talk to Union officials concerning what they consider a labor dispute; 2) the parties to a grievance, including the Union, have no means of forcing testimony through a subpoena or other method; and 3) in his experience, people are often more cooperative and sympathetic when asked for a statement by the person whose job is at risk. Plaintiff called the telephone number and obtained the statement of Willie Mae Turner, the woman to whom the telephone number was registered, stating that Plaintiff had never called her. The Company, however, asserted that Plaintiff was calling the daughter of Willie Mae Turner. Plaintiff failed to depose Turner's daughter or to get the daughter's affidavit in opposition to Defendants' motions for summary judgment. (Appendix A to Plaintiff's Petition at App. 6-7).

SUMMARY OF THE ARGUMENT

Plaintiff failed to show any special or important reason why this Court should grant his Petition. He merely argues that the district court and Fifth Circuit holdings were wrong. This assertion is insufficient to merit the granting of a writ of certiorari. Further, Plaintiff did not support his reasons why the Petition should be granted with specific facts or legal citations.

In any event, the holdings of the district court and Fifth Circuit were correct. The Union did not breach its duty of fair representation in the contractual grievance proceedings. Further, Plaintiff failed to show that the alleged breach affected the result or outcome of the grievance proceedings.

A finding that the Union breached its duty of fair representation is an indispensable prerequisite to maintenance of the § 301 breach of contract suit against the employer. If the plaintiff cannot show that the Union breached its duty of fair representation, the suit must be dismissed without reference to any merits of the underlying breach of contract claim against the employer. Moreover, the plaintiff must be able to show that the alleged breach affected the outcome of the case.

In order to establish that the Union breached its duty of fair representation, the plaintiff must show its actions were either arbitrary, discriminatory, or in bad faith. This burden requires more than a showing of negligence or honest mistaken conduct. The Union's conduct is arbitrary only if the Union's behavior is so far outside a wide range of reasonableness as to be irrational.

Summary judgment is appropriate if the party opposing it fails to establish an essential element of the case which is his burden to prove at trial. Plaintiff established neither that the Union breached its duty of fair representation, nor how a different course of conduct would have changed the outcome of the grievance proceeding. Failing to establish either of these essential elements is fatal to Plaintiff's case. Accordingly, the district court correctly granted the Defendants a summary judgment.

ARGUMENT

A. Plaintiff's Petition Does Not Present Any of the Requisite Factors Which the Court Considers in Granting a Petition for Writ of Certiorari

The Supreme Court grants a Petition for Writ of Certiorari when the case presents "special or important reasons" for granting of the writ. Sup.Ct.R. 10.1. None of the considerations that weigh in favor of granting a writ petition are present in the instant case: 1) although Plaintiff asserts that district courts "have not expressed a consensus concerning the meaning of perfunctory" when dealing with a claim for a Union's breach of the duty of fair representation, Plaintiff does not cite to any cases where the district courts or courts of appeal are in conflict on this issue;[4] 2) the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings, nor

[4] Under Sup.Ct.R. 10.1, the Court will consider exercising its discretionary review if the decisions of two *circuit* courts are in conflict, something which Plaintiff does not even contend.

did it sanction such a departure by the district court; and 3) nothing in this case presents an important, new decision of federal law meriting Supreme Court review.

This case presents a run-of-the-mill § 301/DFR claim. Plaintiff fails to point out anything exceptional about the holdings below. In fact, Plaintiff does not even *attempt* to demonstrate why any of the factors in Sup.Ct.R. 10.1 should apply to this case, but merely asserts that the district court and Fifth Circuit reached the wrong decision. Even if that assertion were true, it would not be sufficient to invoke this Court's review, absent one of the factors listed in Sup.Ct.R. 10.1 or other extraordinary circumstances that are not present here.

B. Plaintiff Failed To Comply With Sup.Ct.R. 24.1(i)

Supreme Court Rule 24.1 sets forth the requirements for a petition for writ of certiorari. Subsection (i) provides that the petition must contain:

> (i) The argument, exhibiting clearly the points of fact and law being presented and citing the authorities and statutes relied upon.

Plaintiff fails to meet these requirements.

Although Plaintiff properly notes this Court has held that in order to be actionable, the breach of duty must affect the result of the grievance (citing *Humphrey v. Moore*, 375 U.S. 335, 351, 84 S. Ct. 363, 372, 11 L.Ed.2d 370 (1964)), Plaintiff does not cite any specific facts to support his bare assertion that any further investigation by the

Union would have changed the outcome of the grievance.[5]

Second, Plaintiff states that "district courts" disagree on the meaning of the term "perfunctory" in a § 301/DFR context. However, Plaintiff fails to cite *any* case law to support this point. Therefore, the Petition should be denied.

C. The District Court Properly Granted Summary Judgment and the Fifth Circuit Properly Affirmed the District Court's Holding

The controlling issue below was whether the Union breached its duty of fair representation in the contractual grievance proceedings and, if so, whether such a breach affected the result or outcome of the grievance proceedings.

A finding that the Union breached its duty of fair representation is an indispensable prerequisite to maintenance of the § 301 breach of contract suit against the employer. *See, e.g., DelCostello,* 462 U.S. at 164-165, 103 S. Ct. at 2290-91; *United Parcel Serv. v. Mitchell,* 451 U.S. 56, 62, 101 S. Ct. 1559, 1563-64, 67 L.Ed.2d 732 (1981). If the plaintiff cannot show that the union breached its duty of fair representation, the suit must be dismissed without

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[5] The district court below expressly found that Plaintiff failed to make any showing that the grievance would have turned out any differently if the Union had done any further investigation, such as contact Turner's daughter. (Appendix A to Plaintiff's Petition at App. 6).

reference to any merits of the underlying breach of contract claim against the employer. *Id.*; *see also Bache v. AT&T Co.*, 840 F.2d 283, 290 (5th Cir.), *cert. denied sub nom Bankston v. AT&T*, 488 U.S. 888, 109 S. Ct. 219, 102 L.Ed.2d 210 (1988). Plaintiff failed to produce evidence to raise a question of fact as to whether the Union breached its duty of fair representation. Therefore, the district court properly granted summary judgment.

Moreover, Plaintiff must be able to show that the alleged breach affected the outcome of the case. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567-68, 96 S. Ct. 1048, 1058-60, 47 L.Ed.2d 231 (1976); *Humphrey v. Moore*, 375 U.S. at 351, 84 S. Ct. at 372.

In order to establish that the Union breached its duty of fair representation, Plaintiff must show its actions were either "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 916, 17 L.Ed.2d 842 (1967); *Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1130, 1135, 113 L.Ed.2d 51 (1991). This burden is a heavy one, inasmuch as a breach of the duty of fair representation requires more than a showing of negligence or honest mistaken conduct. *Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 299-300, 91 S. Ct. 1909, 1924, 29 L.Ed.2d 473 (1971). The union's conduct is arbitrary only if the union's behavior is so far outside a wide range of reasonableness as to be irrational. *O'Neill*, 111 S. Ct. at 1130.

In the present case, the undisputed facts demonstrated that the Union's actions were not "arbitrary, discriminatory, or in bad faith." Plaintiff even admitted in his deposition that he was telling the truth when he told

the Grievance Committee that the Union had given him fair and proper representation. Plaintiff alleges in his Petition that the Union's breach of duty was LeBlanc's failure to call the telephone number himself. (Plaintiff's Petition at 4-5). LeBlanc's reasons for having Plaintiff call the telephone number instead of doing it himself are rational, not arbitrary or discriminatory.

With respect to showing that the alleged breach would have affected the outcome of the case, it is "idle speculation to assume the result would have been different" where a plaintiff fails to establish what he could have added to the case if he had been differently represented. *Humphrey v. Moore*, 375 U.S. at 351, 84 S. Ct. at 372; *Hines*, 424 U.S. at 568, 96 S. Ct. at 1058. As of the date the district court granted the defendants' motions for summary judgment, fourteen months to the day after Plaintiff filed his suit, Plaintiff had produced no evidence in support of his contention that he did not make unauthorized long distance telephone calls, other than the evidence that was introduced during the grievance proceedings. As the district court noted:

> [P]laintiff complains about the Union's failure to interview "the individual Mr. Alfred allegedly placed calls to." . . . The court assumes that plaintiff is referring to the deposition of Mrs. Willie Mae Turner, defendants' exhibit "G". *That testimony in no way exonerates plaintiff since it is clear that the individual the company believed plaintiff had been calling was Mrs. Turner's daughter.* If the daughter's deposition has been taken, plaintiff failed to submit it. Moreover, as defendants correctly point out, plaintiff himself secured a

written statement from Ms. Turner which was presented at the initial hearing.

(Plaintiff's Petition at App. 6-7).

Summary judgment is appropriate if the party opposing it fails to establish an essential element of the case which is his burden to prove at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Plaintiff was able to establish neither that the Union breached its duty of fair representation, nor how a different course of conduct would have changed the outcome of the grievance proceeding. Failing to establish either of these essential elements is fatal to Plaintiff's case. Accordingly, the district court correctly granted the defendants a summary judgment.

CONCLUSION

Plaintiff has not shown any "special or important reasons" why a writ of certiorari should be granted in this case. Sup.Ct.R. 10.1. Plaintiff has not alleged (i) any conflict between the circuits, (ii) departure by the Fifth Circuit from the accepted and usual course of judicial proceedings, or (iii) a sanction of such a departure by the district court. Plaintiff has not complied with Sup.Ct.R. 24.1(i), which requires the petitioner to state the facts upon which his assertions are based, as well as the legal authority supporting his position. Denial of the writ of certiorari will work no injustice in the instant case, since the decisions of the district court and court of appeals are

clearly correct under existing law. For these reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT K. MCCALLA
(Counsel of Record)
KEITH M. PYBURN, JR.
JULIA S. MANDALA
MCCALLA, THOMPSON, PYBURN
& RIDLEY
Poydras Center, Suite 2800
650 Poydras Street
New Orleans, Louisiana 70130
(504) 524-2499

Counsel for Respondent
United Parcel Service, Inc.